No. 17-965

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Petitioners,

v.

STATE OF HAWAII, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Proclamation No. 9645 exceeds the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a).

2. Whether Proclamation No. 9645 "discriminate[s] *** because of *** nationality" in violation of 8 U.S.C. § 1152(a)(1)(A).

3. Whether Proclamation No. 9645 violates the Establishment Clause.

RULE 29.6 DISCLOSURE STATEMENT

Respondent Muslim Association of Hawaii, Inc. has no parent corporations. It has no stock, and hence, no publicly held company holds any of its stock.

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BRIEF IN OPPOSITION

INTRODUCTION

The President has issued a proclamation, without precedent in this Nation's history, that purports to ban over 150 million aliens from this country based on nationality alone. The immigration laws do not grant the President this power: Congress has delegated him only a measure of its authority to exclude harmful aliens or respond to exigencies, and it has expressly prohibited discrimination based on nationality. Nor could Congress vest the President with the authority he claims. The Constitution entrusts the immigration power to Congress in order to protect liberty. Congress may not—and assuredly did not—surrender to the Executive a boundless authori-

ty to set the rules of entry and override the immigration laws at will.

The Ninth Circuit was accordingly correct to uphold a nationwide injunction against the President's unprecedented order. That decision did not question "the President's judgments on sensitive matters of national security" or "restrict[]" the sphere of the President's authority beyond the limits recognized by *every* prior Administration. Pet. 16. Instead, it properly vindicated the judicial role, by ensuring that the President adheres to the limits on his authority that the People and their representatives have imposed.

There is no need for this Court's review. No court has found the proclamation lawful, and the Ninth Circuit's holding is expressly limited to the particular facts of this order. Accordingly, certiorari should be denied. At a minimum, if certiorari is granted, Respondents respectfully request that the Court expedite review to ensure that the State of Hawaii, the individual and association plaintiffs, and millions of similarly situated Americans are not unduly harmed by the President's actions during the pendency of this case.

STATEMENT

The Constitution vests "exclusive[]" control of immigration policy in the hands of Congress. *Arizona* v. *United States*, 567 U.S. 387, 409 (2012) (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)). Nonetheless, since his inauguration, the President has repeatedly attempted to exercise a unilateral authority to exclude millions of individuals from the United States in contravention of the carefully reticulated immigration scheme Congress designed.

1. Seven days after taking office, the President issued an executive order entitled "Protecting the Nation From Foreign Terrorist Entry Into The United States," Exec. Order No. 13,769 (Feb. 1, 2017) ("EO-1"), which purported to temporarily ban entry by nationals of seven Muslim-majority countries and all refugees. *Washington* v. *Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017) (per curiam). A district court promptly enjoined the order, *id.* at 1157, and the Ninth Circuit denied an emergency stay, *id.* at 1156.

Rather than continue defending EO-1—an order sufficiently indefensible that the Government declines even to mention it in its petition, *see* Pet. 5—the President issued a new order, bearing the same title and imposing nearly identical entry bans. Exec. Order No. 13,780 (Mar. 9, 2017) ("EO-2"). EO-2 barred entry by nationals of six overwhelmingly Muslim countries for 90 days, excluded all refugees for 120 days, and capped annual refugee admissions at 50,000. Pet. App. 158a, 165a-166a. It also established a process to identify "additional countries" for "inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals." *Id.* at 159a.

Before EO-2 could take effect, the District Court enjoined the order's travel and refugee bans. *Hawaii* v. *Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017). The Ninth Circuit largely affirmed, holding that EO-2 exceeded the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a), and violated 8 U.S.C. § 1152(a)(1)(A). *Hawaii* v. *Trump*, 859 F.3d 741, 756 (9th Cir. 2017) (per curiam).

This Court granted certiorari and partially stayed the injunction. *Trump* v. *Int'l Refugee Assistance*

Project, 137 S. Ct. 2080 (2017) (per curiam). Before oral argument, EO-2's travel and refugee bans expired, and the Court dismissed the case as moot. 2017 WL 4782860, at *1 (U.S. Oct. 24, 2017).

2. The same day that EO-2's travel ban expired, the President issued a proclamation entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats," Proc. 9645 (Sept. 27, 2017) ("EO-3"). Despite the changed nomenclature, EO-3 is a direct descendant of EO-1 and EO-2. The first line of the order identifies it as an outgrowth of EO-2. Pet. App. 121a. And the order continues, and makes indefinite, substantially the same travel ban that has been at the core of all three executive orders.

In particular, Section 2 of EO-3 continues to ban all immigration from five of the six overwhelmingly Muslim countries covered by EO-2: Iran, Libya, Syria, Yemen, and Somalia. *Id.* at 132a-137a. It switches out the sixth Muslim-majority country, Sudan, for another Muslim-majority country, Chad. *Id.* at 131a-132a. Additionally, the order prohibits all non-immigrant visas for nationals of Syria, all non-immigrant visas except student and exchange visas for nationals of Iran, and all business and tourist visas for nationals of Libya, Yemen, and Chad. *Id.* at 131a-137a.

EO-3 also imposes token restrictions on two non-Muslim-majority countries. The order bars some forms of entry for a small set of Venezuelan government officials. *Id.* at 134a-135a. And it bans all entry from North Korea—a country that sent fewer than 100 nationals to the United States last year,

and that was already subject to extensive entry bans. *See* C.A. E.R. 90.

3. On October 10, the State of Hawaii and Dr. Ismail Elshikh moved to file a Third Amended Complaint challenging EO-3 and adding three new plaintiffs: two John Does and the Muslim Association of Hawaii (the "Association"). Pet. App. 7a. On the same day, Respondents moved for a temporary restraining order (TRO) against EO-3. *Id.* at 76a-78a.[1]

On October 17, 2017, the District Court granted the TRO. *Id.* at 104a-106a. It held that the challenge was reviewable, and that Respondents were likely to succeed in showing that EO-3 transgresses the limits of 8 U.S.C. §§ 1152, 1182(f) and 1185(a). *Id.* at 92a-101a.[2] The District Court also found that the remaining TRO factors were satisfied. *Id.* at 103a-104a.[3]

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[1] Respondents do not challenge EO-3's ban on North Korean nationals because "North Korean person[s]" are already excluded pursuant to a separate sanctions order that is not part of this challenge, Exec. Order No. 13,810 § 1(a)(iv) (Sept. 25, 2017), and because the current state of relations with North Korea presents the sort of exigent circumstance previously found to justify a suspension on entry, *see infra* p. 32. The President's decision to apply the ban only to certain Venezuelan officials distinguishes that country from the other nations affected by the ban.

[2] Because the District Court concluded that Respondents were likely to succeed on their statutory arguments, it did not reach their constitutional claims.

[3] In a parallel challenge in the District of Maryland, the district court concluded that EO-3 violated Section 1152(a)(1)(A) and the Establishment Clause and issued an order largely

On October 20, 2017, the parties jointly stipulated that the TRO should be converted to a preliminary injunction. At the Government's request, this court stayed the injunction pending appeal. *Trump* v. *Hawaii*, 2017 WL 5987406, at *1 (Dec. 4, 2017).

4. In a unanimous, per curiam opinion, the Ninth Circuit affirmed. It began by finding that Respondents' claims are justiciable under both the APA and the court's equitable authority to enjoin *ultra vires* actions by Executive officers. Pet. App. 19a-20a, 23a. The court rejected the application of the doctrine of consular nonreviewability, observing that judicial review of the lawfulness of Executive policies is a fundamental aspect of our constitutional system. *Id.* at 14a-18a.

On the merits, the Ninth Circuit concluded that Respondents were "likely to succeed on their claim that the President has exceeded his delegated authority under section 1182(f)." *Id.* at 25a. The Court explained that Section 1182(f) cannot be read to permit the President to "nullify[] Congress's considered judgments on matters of immigration," and that the "indefinite" nature of the President's policy, its incompatibility with the "statutory framework" for identifying and vetting terrorists, the absence of any "exigenc[y]," and the dearth of any comparable past practice "strongly suggest" that the order is unlawful. *Id.* at 25a-26a, 29a, 35a. The court further held

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enjoining EO-3's implementation. *IRAP* v. *Trump*, No. TDC-17-0361, 2017 WL 4674314 (D. Md. Oct. 17, 2017), *appeal docketed*, No. 17-2240 (4th Cir. Oct. 23, 2017). The Fourth Circuit heard oral argument en banc in December, but has not yet rendered its decision.

that the President had failed to satisfy Section 1182(f)'s explicit "find[ing]" requirement. *Id.* at 47a.

The court also held that EO-3 violates Section 1152(a)(1)(A)'s prohibition on nationality discrimination. It observed that EO-3 "effectuates its restrictions [on entry] by withholding immigrant visas on the basis of nationality." *Id.* at 50a. In so doing, it "directly contravenes Congress's unambiguous directions that no nationality-based discrimination occur" in the issuance of such visas. *Id.* (internal quotation marks omitted).

The Ninth Circuit then surveyed the remaining preliminary injunction factors, finding that all were satisfied. *Id.* at 56a-61a. The court agreed that a nationwide order was appropriate to give effect to the constitutional and congressional policies in favor of a uniform rule of immigration. *Id.* at 62a. But, following this Court's lead in *IRAP*, it limited the injunction to cover only "those persons who have a credible bona fide relationship with a person or entity in the United States." *Id.* at 63a-64a.

ARGUMENT

I. BECAUSE THE DECISION BELOW IS CORRECT, THIS COURT SHOULD DENY REVIEW.

The traditional justifications for granting certiorari are absent. The Government does not even attempt to argue that the Ninth Circuit's decision diverges from the precedent of this Court or other lower courts, and for good reason. The courts have consistently held that EO-3 transgresses the limits of our Constitution and the immigration statutes. Nor can the Government claim that the Ninth Circuit's opinion departs from precedent reviewing the

policies of prior administrations. *No* prior president has attempted to implement a policy that so baldly exceeds the statutory limits on the President's power to exclude, or so nakedly violates Congress's bar on nationality-based discrimination in the issuance of immigrant visas.

Thus, the Government is left to argue that this Court should grant certiorari to correct alleged errors in the Ninth Circuit's decision. Because there are no errors to correct, the petition should be denied.

A. Respondents' Challenge Is Reviewable.

1. Respondents' Article III standing is beyond serious dispute; indeed, the Government does not contest it. The State, "as the operator of the University of Hawai'i system, will suffer proprietary injuries" because of EO-3's impact on current and prospective students, faculty, and speakers. Pet. App. 79a-81a. The individual plaintiffs will be impeded from reuniting with close family who have applied for visas. *Id.* at 82a-85a. And the Association will lose members, visitors, and revenue. *Id.* at 85a-87a. Each harm is actual and imminent, directly traceable to EO-3, and redressable by the order's invalidation.

The Government contends that "respondents' challenges are not ripe" because they depend on "contingent future events." Pet. 20. That is incorrect. EO-3 subjects Respondents' relatives and associates to an immediate ban on entry, and presently hampers the University's recruitment and retention efforts. The prospect that a government official might decide, in his unreviewable discretion, to waive that ban in an individual case does not eliminate the harm. *See Gratz* v. *Bollinger*, 539 U.S.

244, 262 (2003) ("denial of equal treatment resulting from the imposition of [a] barrier" is itself a cognizable injury, regardless of whether it results in the "ultimate inability to obtain [a] benefit"). Indeed, in the short time since the Ninth Circuit issued its opinion, the mother of one of the John Does has had her visa denied, demonstrating that Respondents' asserted harms are far from speculative.[4]

2. Respondents' statutory claims are reviewable through two well-established routes. First, this Court has equitable authority to enjoin "violations of federal law by federal officials," including the President. *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *Chamber of Commerce* v. *Reich*, 74 F.3d 1322, 1327-28 (D.C. Cir. 1996) (Silberman, J.). Second, the APA authorizes the Court to "set aside" agency action at the behest of an "aggrieved" individual. 5 U.S.C. §§702, 706(2). Both routes are available to Respondents: They allege that the President violated the Immigration and Nationality Act ("INA") by promulgating EO-3, and they seek to enjoin agency officials from carrying out the President's unlawful command.

a. The Government argues (at 17-19) that the doctrine of consular nonreviewability renders courts powerless to review the President's compliance with the immigration laws. No case supports that proposition. The Government's authorities state that courts will not scrutinize how an immigration officer

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[4] Because Respondents just learned of the visa denial, they have not yet had an opportunity to supplement the record to reflect this fact. They intend to take the appropriate steps to do so as soon as possible.

"exercis[ed] the *discretion* entrusted to him by Congress" when "exclud[ing] a *given alien*." *U.S. ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543-544 (1950) (emphases added); *see Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1158 & n.2 (D.C. Cir. 1999) (deeming review improper in light of officers' "complete discretion"). There is no question, however, that courts may review whether executive officials have exceeded their authority under the immigration laws, particularly when setting sweeping policies. In *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), for example, the Court reviewed whether "[t]he President * * * violate[d]" various INA and treaty provisions by invoking his authority under 8 U.S.C. § 1182(f) to "suspend[] the entry of undocumented aliens from the high seas." *Id.* at 158, 160.[5] Likewise, in *Knauff*, this Court considered whether entry regulations promulgated by the Attorney General under a precursor of Section 1182(f) were "'reasonable' as they were required to be by the 1941 Act" and whether their application was consistent with the War Brides Act. 338 U.S. at 544-547.

The Government cites a handful of statutes to support its claim of nonreviewability, but if anything they show the opposite. The provisions foreclose review of a targeted class of immigration decisions: They provide, for instance, that courts may not

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[5] The Solicitor General in *Sale* argued at length that the plaintiffs' claims were barred by the doctrine of consular nonreviewability. U.S. Br. 13-18 (No. 92-344); Oral Arg. Tr., 1993 WL 754941, at *16-22 (Mar. 2, 1993). Not one Justice accepted the argument.

review a consular officer's decision, "in his discretion, [to] *revoke* [a] visa," 8 U.S.C. § 1201(i) (emphasis added), or scrutinize "final order[s] of *removal*" outside a petition for review, *id.* § 1252(a) (emphasis added). The statutes say nothing to prevent courts from reviewing whether sweeping immigration policies violate the immigration laws—still less do they satisfy the "heavy burden" of "show[ing] that Congress 'prohibit[ed] all judicial review' of the [Executive]'s compliance with a legislative mandate." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015).

The Government asserts (at 18) that "permitting review of the President's decision" would "invert the constitutional structure." But the Constitution gives Congress "exclusive[]" authority to set immigration policy. *Arizona*, 567 U.S. at 409. The President, in contrast, must take care that Congress's laws are faithfully executed. U.S. Const. art. II, § 3. The notion that the Judiciary cannot prevent the President from transgressing the limits of his authority—no matter how brazen the statutory violation—contravenes our Constitution's fundamental separation of powers. *See INS* v. *Chadha*, 462 U.S. 919, 953 n.16 (1983).

b. The Government offers three additional reasons (at 19-20) why it believes APA review is unavailable. None bears scrutiny.

First, the Government asserts that Congress vested the President with unreviewable "discretion" to exclude aliens whenever he wishes. 5 U.S.C. § 701(a)(2). The essence of Respondents' argument, however, is that Congress imposed limits on the President's power—ones vital to the separation of

powers, and which the President has grossly exceeded. *See infra* pp. 13-32.

Second, the Government claims the Defendants have not taken "final agency action." 5 U.S.C. § 704. That is plainly incorrect: The Departments of State and Homeland Security have "put the Proclamation into effect" and issued detailed guidance describing their enforcement policy. Pet. 12.[6] The fact that the agencies have not yet denied waivers to some of the plaintiffs or their family members is immaterial; a policy is "final" if it "give[s] notice" of the agency's enforcement plans, even if no "particular action [has been] brought against a particular [entity]." *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016). In any event, the President has made the final decision to promulgate EO-3; although the President is not an "agency," the Court retains equitable authority to enjoin actions taken by the President in excess of his statutory authority. *Chamber of Commerce*, 74 F.3d at 1327-28; *see, e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 667 (1981).

Third, the Government asserts that Respondents fall outside the INA's zone of interests. The INA, however, contains numerous provisions designed to facilitate the admission of students and scholars, *see* 8 U.S.C. § 1101(a)(15)(F), (H), (J), (O), and promote family unification, *id.* § 1153(a). Respondents fall at least "arguably within the zone of interests * * * protected" by these provisions, and EO-3 intrudes on

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[6] *See* U.S. Dep't of State, *New Court Orders on Presidential Proclamation* (Dec. 4, 2017), https://goo.gl/JAGjXd; U.S. Dep't of Homeland Sec., *Fact Sheet: The President's Proclamation* (Sept. 24, 2017), https://goo.gl/gaiEpi.

those interests. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U.S. 209, 224 (2012); *see Legal Assistance for Vietnamese Asylum Seekers* ("*LAVAS*") v. *Dep't of State*, 45 F.3d 469, 471 (D.C. Cir. 1995) (Sentelle, J.).

B. EO-3 Exceeds the Limits of Sections 1182(f) and 1185(a).

The Ninth Circuit correctly held that EO-3 exceeds the limits on the President's authority under Sections 1182(f) and 1185(a). Section 1182(f) provides that the President may "suspend the entry" of any aliens or any class of aliens whose entry he "finds * * * would be detrimental to the interests of the United States." Although the power this provision confers is broad, it is not—and cannot be—unlimited. Rather, the provision's text, purpose, history, and structure, as well as the structural limits of the Constitution itself, make clear that Section 1182(f) confers a limited and interstitial power: To exclude classes of aliens who are themselves harmful to the national interest, or to prevent exigent threats that Congress cannot easily address. Because EO-3 exceeds the established limits of the President's authority and flouts the will of Congress, it was properly enjoined.

1. *Section 1182(f) does not grant the President limitless power.*

a. The Constitution entrusts "[p]olicies pertaining to the entry of aliens * * * exclusively to Congress." *Arizona*, 567 U.S. at 409 (quoting *Galvan*, 347 U.S. at 531). For over a century, Congress has implemented its immigration power principally through an "extensive and complex" statutory code—one that "specifie[s]" in considerable detail the "categories of

aliens who may not be admitted to the United States." *Id.* at 395.

In Section 1182(f), Congress delegated a portion of its immigration power to the President. Like many provisions of the immigration laws, that delegation is framed in broad terms. In order to give the Executive the flexibility to deal with dynamic conditions, Congress "must of necessity paint with a brush broader than that it customarily wields in domestic areas." *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965).

The fact that Congress intends to delegate a share of its power, however, "does not mean" that it wishes to—or can—"grant the Executive totally unrestricted freedom of choice." *Id.* Congress cannot, and assuredly does not, use limitless delegations to "surrender" its constitutionally-committed legislative authority in the immigration realm. *Clinton* v. *City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring); *see Zemel*, 381 U.S. at 17-18; *Carlson* v. *Landon*, 342 U.S. 524, 543-544 (1952).

Accordingly, this Court has consistently refused to read facially broad immigration provisions, "in isolation and literally," to confer "unbounded authority." *United States* v. *Witkovich*, 353 U.S. 194, 199 (1957). Rather, such provisions derive "rational content" from "all relevant considerations," including their history, purpose, context, executive practice, and the Constitution itself. *Id.* In *Kent* v. *Dulles*, 357 U.S. 116 (1958), for example, the Court held that a statute granting the President authority to "designate and prescribe [passport rules] for and on behalf of the United States" did not confer "unbridled discretion," but authorized visa denials only on those grounds supported by "prior administrative practice."

Id. at 123, 128; *see Zemel*, 381 U.S. at 17-18 ("reaffirm[ing]" this holding); *Haig* v. *Agee*, 453 U.S. 280, 297-298 (1981) (same). Similarly, in *Witkovich*, the Court held that the Attorney General's "seemingly limitless" authority to "require whatever information he deem[ed] desirable of aliens" was not "unbounded," but permitted only those questions relevant to the statute's "purpose" of assessing "deporta[bility]." 353 U.S. at 199-200. Other examples abound. *See, e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001); *INS* v. *Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 191-194 (1991); *Carlson*, 342 at 543-544; *Mahler* v. *Eby*, 264 U.S. 32, 40 (1924).

b. These principles apply with particular force to Section 1182(f). The authority granted by that provision is exceptionally potent: It enables the President to exclude "any class of aliens" or "*all* aliens" from the country "for such period as he shall deem necessary." 8 U.S.C. § 1182(f) (emphasis added). If, as the Government contends (at 21), the President could invoke Section 1182(f) for any reason or no reason at all, he could nullify entire swathes of the immigration code at will. He could end the family-preference system, revive the national origin quotas Congress abolished a half century ago, or supplant the specific grounds of inadmissibility listed in Section 1182(a). Indeed, the President could shut the borders entirely based on nothing more than his view that the country admits too many foreign nationals.

It is profoundly implausible that Congress vested the President with such a staggering and limitless suspension power. Congress does not grant the Executive authority to "transform [a statute's] carefully described limits *** into mere suggestions."

Gonzales v. *Oregon*, 546 U.S. 243, 260-261 (2006). And this Court has recently and repeatedly instructed that facially unqualified statutory provisions should not be read to swallow a statutory scheme. *See, e.g.*, *Yates* v. *United States*, 135 S. Ct. 1074, 1083, 1087 (2015) (plurality op.); *Util. Air Regulatory Grp.* (*"UARG"*) v. *EPA*, 134 S. Ct. 2427, 2442 (2014).

Moreover, reading Section 1182(f) to confer so sweeping a power would raise grave constitutional concerns. It would render Section 1182(f) a delegation of unprecedented political and economic significance, unconstrained by any intelligible principle. *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001). Indeed, it would enable the President to effectively "cancel" provisions of the immigration laws with which he disagrees. *Clinton*, 524 U.S. at 436. The clearest possible evidence would be required before inferring that Congress chose to "[a]bdicat[e] [its] responsibility" over immigration and "compromise[] the political liberty of our citizens * * * which the separation of powers seeks to secure." *Id.* at 452 (Kennedy, J., concurring).

c. The Government sweeps these separation of powers principles aside, asserting (at 27) that *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), and *Knauff* permit Congress to surrender its power to make immigration policy to the President. That is incorrect. *Curtiss-Wright* held that Congress may delegate the President unusually broad discretion to negotiate with foreign governments because the foreign affairs power "d[oes] not depend upon the affirmative grants of the Constitution." *Id.* at 318. This Court has since repudiated the suggestion, however, that the President has "broad, undefined powers over foreign affairs." *Zivotofksy ex rel Zivo-*

tofsky v. *Kerry*, 135 S. Ct. 2076, 2089-90 (2015). And whatever powers he possesses in this realm do not include the authority to write (or rewrite) our Nation's immigration policies. That power was expressly delegated by the States to the Federal Government and lodged specifically in Congress. *See* U.S. Const. art. I, § 8, cl. 4; 3 Joseph Story, Commentaries on the Constitution of the United States § 1098 (1833). Accordingly, this Court has time and again recognized that Congress may not delegate immigration authority without imposing meaningful constraints on those delegations. *See Mahler*, 264 U.S. at 40; *Carlson*, 342 U.S. at 543-544; *Zemel*, 381 U.S. at 17-18.

Knauff is similarly unavailing. There, Justice Minton suggested—relying on *Curtiss-Wright*—that the President has inherent authority over immigration as a component of "the executive power to control the foreign affairs of the nation." 338 U.S. at 542. That statement, however, espoused the same overbroad view of the foreign affairs power that *Zivotofsky* later rejected. Moreover, *Knauff* made that assertion with reference to the President's authority during a time of war, when the President's power is at its zenith because of his constitutionally-assigned role as Commander in Chief. Whatever the scope of the President's authority to bar entry in that emergency circumstance, the President plainly does not have the same inherent power to make immigration policy in time of peace; as the Court has repeatedly reiterated in the years since *Knauff* was decided, that power is "entrusted *exclusively* to Congress." *Arizona*, 567 U.S. at 409 (emphasis added).

2. Section 1182(f) grants the President an interstitial power to exclude harmful aliens and respond to exigencies.

Every source of Section 1182(f)'s meaning makes clear that Congress intended this provision to confer a limited and interstitial power that preserves Congress's constitutional role as author of our immigration policy. Properly construed, it permits the President to supplement Congress's list of excludable classes of aliens with additional categories of harmful aliens, and it gives the President the flexibility to respond to exigencies that Congress cannot practicably address. It does not give the President the power to write immigration policy from whole cloth.

Text. Section 1182 begins with a long and exceptionally detailed list of "[c]lasses of aliens" whom Congress wished to exclude from the United States. 8 U.S.C. § 1182(a). Each of these categories consists of aliens who themselves have engaged in conduct or have some status that renders them harmful to the United States. *See, e.g.*, *id.* § 1182(a)(1)(A) (communicable disease); *id.* § 1182(a)(3)(B) (terrorist); *id.* § 1182(a)(4) (public charge). Section 1182(f) appears after that list, providing the President the authority to exclude additional "aliens" or "classes of aliens" when he "finds" that their admission "would be detrimental to the interests of the United States."

The most plausible reading of Section 1182 as a whole, therefore, is that it sets out the categories of aliens that should be excluded in Section 1182(a), and then provides the President in Section 1182(f) with the residual authority to supplement that list to address categories of harmful aliens that Congress has not considered or to account for an exigency that

Congress cannot practicably address. *See Abourezk* v. *Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (Section 1182(f) "provides a safeguard against the danger posed by any particular case or class of cases that is *not* covered by one of the categories in section 1182(a)" (emphasis added)), *aff'd by equally divided Court*, 484 U.S. 1 (1987) (per curiam). It would be deeply unnatural to read Section 1182 as first setting out a detailed list of who may be excluded, and then granting the President the authority in Section 1182(f) to "effortlessly evade" the statute's "specifically tailored" criteria for inadmissibility. *EC Term of Years Tr.* v. *United States*, 550 U.S. 429, 434 (2007).

The words that Congress employed in Section 1182(f) confirm that Congress did not intend to give the President the power to exclude any or all aliens whenever he chooses. When Congress enacts a phrase that "has been given a uniform interpretation by inferior courts or the responsible agency," a later statute "perpetuating the wording is presumed to carry forward that interpretation." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 322 (2012); *see Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013). In *Kent*, *Zemel*, and *Haig*, for instance, the Supreme Court held that a passport statute enacted in 1918, extended in 1941, and made permanent in 1952 implicitly incorporated two longstanding limits evident in the "administrative practice" followed under the predecessor statutes. *Kent*, 357 U.S. at 128; *see Zemel*, 381 U.S. at 17-18; *Haig*, 453 U.S. at 297-298. The same interpretive rule governs here: For decades prior to the enactment of Section 1182(f) in 1952, statutes and Presidential orders had excluded "classes of aliens"

found to be "prejudicial to the interests of the United States"; by borrowing that language in Section 1182(f), Congress brought the limits of that textual formulation with it.

Congress first gave the President explicit authority to suspend the entry of aliens in 1918, when President Wilson sought certain wartime powers over immigration. Act of May 22, 1918, § 1(a), 40 Stat. 559, 559. That year, the President exercised his new power to bar a set of aliens who directly sought to harm national security, including spies, saboteurs, and other subversives. Proc. 1473, § 2 (1918); *see* 58 Cong. Rec. 7303 (1919); H.R. Rep. No. 65-485, at 3 (1918). He described these aliens as "*prejudicial to the interests of the United States.*" Proc. 1473, § 2 (emphasis added).

In 1941, on the eve of World War II, Congress incorporated President Wilson's words into law. It amended the 1918 statute to provide that the President could exclude aliens during "war or * * * national emergency" if he found that "*the interests of the United States* require" it. Act of June 21, 1941, 55 Stat. 252, 252-253 (emphasis added). President Roosevelt's administration then issued regulations excluding several "[c]*lasses of aliens* whose entry [wa]s deemed to be *prejudicial to the interests of the United States.*" 6 Fed. Reg. 5929, 5931 (Nov. 22, 1941) (emphases added); *see* Proc. 2523, § 3 (1941). Just as in President Wilson's order, those "classes" consisted exclusively of aliens who themselves threatened national security, such as spies and saboteurs. 22 C.F.R. § 58.47(b)-(h) (1941); *see also id.* §58.47(a) (excluding aliens who were already statutorily inadmissible). The regulations also included a catchall category, authorizing the exclusion of "[a]*ny*

alien * * * in whose case circumstances of a similar character may be found to exist, which render the alien's admission prejudicial to the interests of the United States, which it was the purpose of the act of June 21, 1941 * * * to safeguard." *Id.* § 58.47(i) (emphasis added). President Truman continued the same practice, only marginally extending the regulations to include "war criminal[s]." 10 Fed. Reg. 8997, 9000-01 (July 21, 1945); *see* Proc. 2850 (1949).[7]

Accordingly, when Congress enacted the INA in 1952, it acted against an unbroken practice—spanning two World Wars, six Presidents, and the outbreak of the Korean War and the Cold War—under which Presidents had deemed "class[es] of aliens" * * * prejudicial to the interests of the United States" only where the aliens themselves threatened harm to the United States (such as spies and saboteuers), or to preserve a measure of residual authority to exclude other aliens who threaten "the purpose of [Congress's] act" in ways Congress and the President had not yet anticipated. In Section 1185, Congress reenacted without relevant change the wartime statute under which Presidents Wilson, Roosevelt, and Truman had issued these exclusions. Immigration and Nationality Act of 1952, Pub. L. 82-414, § 215(a). And in Section 1182(f), Congress borrowed the operative language of the implementing regulations and proclamations almost verbatim and permitted the President to exclude "class[es] of aliens * * * detrimental to the United States" during times of

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[7] Pursuant to the Alien Enemies Act, the regulations were also expanded to include "enemy aliens" aged fourteen or older. 22 C.F.R. § 58.53(i) (1945); *see* 50 U.S.C. § 21.

peace, as well. *Id.* §212(e). Absent "evidence of any intent to repudiate the longstanding administrative construction"—of which there is none—it is reasonable to infer that Congress intended these words to convey the same limited meaning they carried for decades. *Haig*, 453 U.S. at 297-298.[8]

Purpose. The statute's purpose strongly supports this reading. The drafters of the 1918 statute stated that their "inten[t]" was principally to authorize the President to exclude "renegade Americans or neutrals" employed as German "agents." H.R. Rep. No. 65-485, at 2. But they drafted the provision more "broad[ly]" because "[n]o one can foresee the different means which may be adopted by hostile nations to secure military information or spread propaganda and discontent," and because it was "obviously impracticable [for the President] to appeal to Congress for new legislation in each new emergency." *Id.* at 3.

The drafters of the 1941 statute shared the same limited objectives. President Roosevelt initially requested authority to exclude aliens harmful to "the interests of the United States" so that he could exclude foreign agents "engaged in espionage and

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[8] The Government observes (at 26) that Section 1182(f), unlike its predecessors, is not limited to times of war or national emergency. That alteration does not affect the established meaning of the phrase "detrimental to the interests of the United States." Nor does it suggest that the statute is no longer designed to address exigencies: To the contrary, the statute's sponsor expressly stated that Congress removed these limits so that the President could suspend entry in *other* exigencies in which it is "impossible for Congress to act." 98 Cong. Rec. 4423 (1952) (statement of Rep. Walter).

subversive activities" prior to the outbreak of war. 87 Cong. Rec. 5048 (1941) (statement of Ruth Shipley, Director, Passport Division, U.S. Dep't of State). Several members of Congress balked at this language, however, because it appeared to "give the President unlimited power, under any circumstances, to make the law of the United States," *id.* at 5326 (statement of Sen. Taft), or to "override the immigration laws," *id.* at 5050 (statement of Rep. Jonkman). The bill's sponsors reassured them that the statute "would *only* operate against those persons who were committing acts of sabotage or doing something inimical to the best interests of the United States, *under the Act as it was in operation during [World War I].*" *Id.* at 5049 (statement of Rep. Eberharter) (emphases added). The State Department offered a similar "assurance" that "the powers granted in the bill would not be used except for the objective" of "suppress[ing] subversive activities." *Id.* at 5386 (statement of Rep. Van Nuys).

Presidents Roosevelt and Truman fulfilled that promise. *See supra* pp. 20-21. And in 1952, when Congress borrowed the express terms of the wartime regulations to create Section 1182(f), the provision attracted almost no debate. The sole explanation by the bill's supporters reaffirmed the statute's longstanding objective: Representative Walter, the House sponsor, stated that Section 1182(f) was "essential" because it would permit the President to suspend entry during an exigency, like an "epidemic"

or economic crisis, in which "it is impossible for Congress to act." 98 Cong. Rec. 4423 (1952).[9]

Executive practice. Presidential practice since 1952 provides further support for this reading. *See Dames & Moore*, 453 U.S. at 686 (explaining that "systematic, unbroken, executive practice * * * may be treated as a gloss" on presidential power (citation omitted)). Forty-two of the 43 orders issued prior to EO-1 excluded additional classes of aliens who themselves engaged in conduct harmful to the national security. *See* Cong. Research Serv., *Executive Authority to Exclude Aliens: In Brief* 6-10 (2017), https://goo.gl/2KwIfV (listing orders). The sole remaining order, President Reagan's restriction on Cuban nationals, responded to a dynamic and fast-moving diplomatic crisis that, by its nature, was difficult for Congress to "swiftly" address. *Zemel*, 381 U.S. at 17. And it sought to further a longstanding congressional policy in favor of normalizing relations with Cuba "on a reciprocal basis." Foreign Relations Authorization Act, Fiscal Year 1978, Pub. L. 95-105, § 511 (1977).[10]

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[9] The Government cites several statements by opponents of the INA expressing concern that Section 1182(f) would vest the President with unbounded authority. Pet. 26 & n.8. None of the Act's supporters affirmed these descriptions, and they are not probative. *See Bryan* v. *United States*, 524 U.S. 184, 196 (1998) ("[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation. In their zeal to defeat a bill, they understandably tend to overstate its reach." (citations omitted)).

[10] President Carter's 1979 Iran order did not suspend entry and was not issued pursuant to Section 1182(f). *See infra* p. 32.

The Constitution. Finally, these limits on the President's Section 1182(f) power are consistent with the President's established and proper role in the constitutional scheme. Section 1182(f) gives the President flexibility to respond to "changeable and explosive" circumstances in which Congress cannot "swiftly" act. *Zemel*, 381 U.S. at 17. But it leaves "exclusively to Congress" the authority to set immigration policy in the ordinary course. *Arizona*, 567 U.S. at 409.

3. EO-3 exceeds the limits of Section 1182(f).

EO-3 exceeds the longstanding limits on the President's Section 1182(f) authority.

As an initial matter, there is no contention that EO-3 excludes aliens who *themselves* threaten harm, such as subversives, spies and war criminals—the heartland of the President's exclusion power for the last 99 years. Indeed, the Government has long disclaimed any belief that all 150 million aliens the President is excluding are "potential terrorists" or that they otherwise intend harm to the United States. U.S. Reply Br. 24, *Hawaii* v. *Trump*, No. 17-15589 (9th Cir. Apr. 28, 2017).

Nor does EO-3 fall within the President's residual authority to adapt congressional policy to exigencies in which Congress cannot practicably act. *First*, the order does not respond to an exigency of any kind. Rather, it raises concerns about screening and vetting that have existed for years if not decades—ones that Congress has repeatedly enacted legislation specifically to address. *See infra* p. 26 n.11. Unlike

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But it too involved an "international cris[i]s" requiring swift presidential action. *Dames & Moore*, 453 U.S. at 669.

President Reagan's Cuba order or the wartime proclamations issued in 1918 and 1941, EO-3 does not respond to a fast-breaking diplomatic crisis, a war, a national emergency, or any other "changeable and explosive" circumstance to which Congress cannot "swiftly" respond. *Zemel*, 381 U.S. at 17.

Second, EO-3 does not follow but instead subverts congressional policy. Congress has established an intricate scheme for identifying and vetting terrorists. That system includes "specific criteria for determining terrorism-related inadmissibility," *Kerry* v. *Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in the judgment) (citing 8 U.S.C. § 1182(a)(3)(B)), finely reticulated vetting procedures,[11] and exclusions from the Visa Waiver Program for aliens from countries deemed to present a heightened terrorist threat, 8 U.S.C. § 1187(a)(12).

The President has effectively overridden Congress's scheme and replaced it with his own. EO-3 excludes aliens who do not satisfy any of the criteria set in the statutory terrorism bar. It sidesteps entirely the vetting scheme Congress established. And whereas Congress determined—in the face of similar security concerns—that aliens from five of the targeted countries could be admitted if they underwent vetting through visa procedures, the proclamation deems such vetting categorically inadequate and imposes a blanket ban. The Government asserts (at 25) that it has merely "add[ed]" to these requirements, but its "additions" thwart the judgments

[11] *See, e.g.*, Pub. L. 110-53, §§ 701-731 (2007); Pub. L. 107-173 (2002); 8 U.S.C. §§ 1201-1202, 1221-1226a, 1361.

Congress made and gut its careful scheme for over 150 million foreign nationals.

The President has thus taken "measures [that a]re incompatible with the expressed *** will of Congress." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The immigration laws vest the President with broad authority, but that authority must be exercised subject to the limits set by Congress. EO-3 transgresses those limits, and was properly enjoined.

4. EO-3 lacks an adequate finding of detrimentality.

In addition to exceeding the substantive limits on the President's Section 1182(f) power, EO-3 also fails to satisfy the statutory precondition that the President "*find[]*" that entry of the excluded aliens "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f) (emphasis added); *see* Pet. App. 42a-47a. The drafters of Section 1182(f) and its predecessors specifically used the word "find" rather than "deem" to ensure that the President would "base his [decision] on some fact," rather than mere "opinion" or "guesses." 87 Cong. Rec. 5051 (1941) (statements of Rep. Jonkman and Rep. Jenkins). Although this standard does not require "detailed public justifications" (Pet. 22), it does require that there be at least a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962).

EO-3 fails to satisfy this straightforward requirement. Its principal rationale is that the affected countries lack adequate "identity-management and information-sharing protocols" to provide the United States "sufficient information to assess the risks"

that their nationals pose. Pet. App. 128a-129a. But EO-3 does not state that immigration officials are unable to address such information deficits under existing law, and for good reason: The INA already permits immigration officers to deny entry to aliens who cannot produce "sufficient information" to demonstrate their admissibility. *See* 8 U.S.C. § 1361. Furthermore, notwithstanding the ostensible defects that EO-3 identifies, the order permits nationals from all of the banned countries to enter on non-immigrant visas or through case-by-case waivers. There is no rational reason why the problem the Government identifies warrants *any* suspension of entry, and the scope of the suspension the President has ordered simply does not correspond to the problem EO-3 identifies.

Nor does the President's stated desire to encourage diplomatic improvements, *see* Pet. 22, provide the requisite link. That diplomatic objective is not a "detriment[] to the interests of the United States" that would be caused by aliens' entry. And because every exclusion policy places pressure on the affected government, permitting the President to suspend entry on this basis would eliminate any practical limit on the President's 1182(f) authority.

C. EO-3 Separately Violates Section 1152.

The Ninth Circuit was also correct that EO-3 violates 8 U.S.C. § 1152(a)(1)(A). The plain text of this provision states that "no person shall *** be discriminated against in the issuance of an immigrant visa because of *** nationality." 8 U.S.C. § 1152(a)(1)(A). As Judge Sentelle has explained, "Congress could hardly have chosen more explicit

language" in "unambiguously direct[ing] that no nationality-based discrimination shall occur." *LAVAS*, 45 F.3d at 473.

EO-3 flouts that clear command. The proclamation provides that the "nationals" of several targeted countries may not be "issu[ed] *** a visa" unless they satisfy the stringent requirements for obtaining a case-by-case waiver. Pet. App. 131a-137a, 140a. It is difficult to conceive of a more flagrant example of "discriminat[ion] *** because of *** nationality." 8 U.S.C. § 1152(a)(1)(A).

1. The Government's tortured efforts to show otherwise are nearly self-refuting. The Government asserts (at 29) that Section 1152(a)(1)(A) only applies to "aliens who are not disqualified from receiving a visa" under Sections 1182 or 1185(a). There is no textual basis for this distinction: Section 1152 states that "*no* person" shall be discriminated against on the basis of nationality; it does not limit its purview to those who have already been found "eligible" for a visa under Sections 1182 or 1185. Moreover, Section 1152(a)(1)(A) includes express exceptions that authorize nationality distinctions when determining whether an alien is eligible for a "special immigrant" visa under Section 1101(a)(27) or an "immediate relative" visa under Section 1151(b)(2)(A)(i). These detailed exceptions are superfluous unless Section 1152(a)(1)(A) otherwise bars nationality distinctions when determining visa eligibility.

Moreover, the Government's interpretation would gut Section 1152(a)(1)(A). It would permit the President to revive the "country-based quota system," Pet. 29, simply by excluding nationals from disfavored nations under Section 1182(f). And it would permit

consular officers to engage in gross nationality-based discrimination so long as they did so while determining an alien's "eligibility" under the provisions of Section 1182(a). That plainly is not what Congress intended.

The Government also claims (at 31) that in the event of a conflict, Sections 1182(f) and 1185(a) supersede the limits in Section 1152(a). Every applicable canon of statutory interpretation says otherwise. Section 1152(a)(1)(A)'s prohibition of a particular action (nationality discrimination) is considerably more specific than the general authorizations to "suspend * * * entry" or set "reasonable rules" regarding entry. 8 U.S.C. §§ 1182(f), 1185(a). Section 1152(a)(1)(A) was enacted later-in-time than both Section 1182(f) and Section 1185(a).[12] And Section 1152(a)(1)(A) contains several express exceptions, some of surpassing obscurity, that do not include Sections 1182(f) and 1185(a). Reading these provisions in harmony does not effect an implied repeal; it is simply part of the "classic judicial task of reconciling many laws enacted over time." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988).

Nor is there merit to the Government's passing suggestion (at 32) that the President may evade Section 1152(a)(1)(A) by engaging in nationality discrimination at the point of entry rather than at the time of visa issuance. The sole purpose of a visa is to enable entry. The Government discriminates in

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[12] The Government gestures (at 31) towards the 1978 revisions to Section 1185(a), but nothing in those amendments remotely suggests an intent to repeal or limit Section 1152(a)(1)(A).

the "issuance of *** visa[s]" if it issues visas to disfavored nationals but deprives them of operative effect, just as a company discriminates in the "hiring of employees" if it hires African-Americans only for jobs that receive no pay.

2. Finding no foothold in the text, the Government rests considerable weight on the claim that Section 1152(a)(1)(A) would raise constitutional concerns if it prohibited the President from drawing nationality distinctions to prevent an imminent threat of terrorism or when the country is "on the brink of war." Pet. 30. But no party interprets the provision that way. Section 1152(a)(1)(A) bars "discrimination," a well-established term in the law that does not extend to restrictions closely drawn to address a "compelling" exigency. *LAVAS*, 45 F.3d at 473; *see Sekhar*, 133 S. Ct. at 2724 (a word with a settled legal meaning "brings the old soil with it"). Indeed, Section 1152(a)(1)(A)'s drafters expressly distinguished between nationality distinctions based on "the racial origin of prospective immigrants," which are barred by Section 1152(a)(1)(A), and "those which are designed to keep subversive elements from our shores," which are not. 111 Cong. Rec. 21,782 (1965) (statement of Rep. Matsunaga).[13]

Historical practice confirms this understanding: The only two examples of nationality-based restrictions the Government has identified were tailored to specific exigencies. In 1986, President Reagan restricted entry by some Cuban nationals

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[13] In addition, the Alien Enemies Act expressly authorizes the President to exclude "natives" and "citizens" of a country that "threaten[s]" war against the United States. 50 U.S.C. § 21.

after Cuba had breached an immigration agreement, lesser sanctions had failed, and Cuban officials had begun "facilitating illicit migration to the United States" and abusing the visa process to "traffick[] in human beings." Proc. 5517 (1986); U.S. Dep't of State Bull. No. 2116, *Cuba: New Migration and Embargo Measures* 86-87 (Nov. 1986). In 1979, President Carter responded to a severe "internation-al cris[i]s"—the imprisonment of over 50 Americans as hostages—by delegating his authority to impose restrictions on Iranian nationals, and even then his order did not itself impose restrictions on entry. *Dames & Moore*, 453 U.S. at 669; *see* Exec. Order No. 12,172 § 1-101 (1979). The President's restrictions on "North Korean person[s]" similarly respond to the emergency posed by that country's ongoing efforts to obtain nuclear weapons and missiles capable of striking the United States. Exec. Order No. 13,810 § 1(a)(iv).

It is not difficult to distinguish between these pressing exigencies and the President's desire to "incentivize foreign nations" to provide more information to assist in the visa process. Under any conceivable definition, EO-3 engages in "discrimination *** because of *** nationality" and so is unlawful.

D. EO-3 Violates the Establishment Clause.

Even if EO-3 could somehow pass muster under the INA, it would nonetheless be unlawful because it contravenes the Establishment Clause. The evidence was overwhelming that EO-2 was promulgated for the unconstitutional purpose of preventing Muslim immigration. *See* Resp. Br. 47-60, *Hawaii* v. *Trump*,

No. 16-1540 (U.S. Sept. 11, 2017). In design and effect, EO-3 continues the same unlawful policy. It expressly acknowledges that it emerged as a result of EO-2, and it indefinitely continues the bulk of EO-2's entry suspensions.

Furthermore, the President has repeatedly explained that the two orders pursue the same aim. *See* Amicus Br. of MacArthur Justice Ctr. 22-27, C.A. Dkt. 45. Nine days before EO-3 was released, for example, the President demanded a "larger, tougher and more specific" ban, reminding the public that he remains committed to a "travel ban" even if it is not "politically correct." C.A. E.R. 88. And on the day EO-3 became public, the President made clear that it *was* the harsher version of the travel ban, telling reporters, "The travel ban: the tougher, the better." *Id.* at 91.

Although EO-3 purports to have arisen out of a neutral review process, that "neutral" review was in large part predetermined by EO-2, and the President himself substantially deviated from the recommendations he received. *See* Pet. App. 96a. Moreover, the order operates in a manner at odds with the primary secular rationale it asserts. *See supra* pp. 27-28. And the addition of two non-Muslim countries appears almost entirely symbolic: A prior sanctions order already restricts the entry of North Korea's nationals (who virtually never apply for admission to the United States in any event), and only a small handful of Venezuelan government officials are affected by EO-3. Indeed, one might be forgiven for assuming that these countries were added primarily to improve the Government's "litigating position," rather than to achieve any legitimate substantive

goal. *McCreary Cty.* v. *ACLU*, 545 U.S. 844, 871 (2005).

In short, an objective observer would still conclude that EO-3's purpose is the fulfillment of the President's unconstitutional promise to enact a Muslim ban. *See* Amicus Br. of Interfaith Orgs. & Clergy Members 8-17, C.A. Dkt. 73. Although the Ninth Circuit did not need to reach the issue because of EO-3's obvious statutory flaws, this grave constitutional defect would be sufficient by itself to justify the affirmance of the preliminary injunction.

E. The Scope of the Injunction Is Proper.

Finally, the Ninth Circuit's injunction is not overbroad. This Court has long made clear that "the scope of injunctive relief" must be "dictated by the extent of the violation established." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979). Accordingly, when an Executive Branch policy violates a statute or the Constitution, it is invalid and must be struck down on its face. *See, e.g.*, *UARG*, 134 S. Ct. at 2449. A "facial challenge" is thus a "proper response to the systemic disparity between [a] statutory standard" and an Executive Branch policy. *Sullivan* v. *Zebley*, 493 U.S. 521, 536 n.18 (1990).

The Government argues (at 32) that constitutional principles require the injunction to be narrowed. No precedent supports that proposition. The cases cited by the Government hold only that courts must limit injunctive relief to the policy or provision "that produced the injury in fact that the plaintiff has established." *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996); *see Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (considering whether "the challenged *provisions*" should be enjoined (emphasis

added)); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101, 106 (1983) (considering whether plaintiff had standing to obtain injunction against "the City's *policy*" (emphasis added)). That is what the lower courts did here: They enjoined only those provisions of EO-3 that harm Respondents.

The Government also alleges (at 32) that the injunction is not "necessary to afford complete relief to respondents themselves." That is wrong. Respondents cannot identify in advance precisely which individuals may wish to enroll in the State's University or join the Association. And relief targeted at "specific aliens abroad," Pet. 33, would not eliminate the substantial deterrent effect of EO-3 on prospective candidates from the affected countries.

Moreover, as the Court of Appeals recognized, a nationwide injunction is appropriate in light of the constitutional requirement for a "uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4; *see* Pet. App. 62a. Contrary to the Government's assertion (at 33), the Court of Appeals did not conclude that a nationwide injunction is required in every immigration case. Rather, it merely recognized that ordering more limited relief in this case would irrationally fragment the "comprehensive and unified system" of immigration, *Arizona*, 567 U.S. at 401, and would "harm [Respondents'] interests," Pet. App. 63a.

II. AT A MINIMUM, THIS COURT SHOULD HEAR THE CASE ON AN EXPEDITED SCHEDULE.

Because the Ninth Circuit's decision is correct, this Court should promptly deny review. But at a minimum, if this Court decides to hear the case, it should do so on an expedited schedule.

This Court stayed the preliminary injunction on EO-3 during the pendency of the proceedings. Thus, until this Court denies certiorari or issues a decision on the merits, Respondents are subject to the irreparable harms that EO-3 inflicts: The individual plaintiffs are forced to endure separations from their loved ones. The Association is faced with a diminution of its community and its financial resources. And the State of Hawaii must cope with harms to its universities, its tourism industry, and its sovereign right to establish policies of religious tolerance and non-discrimination.

Given the magnitude of these harms, this Court should ensure that any merits review is completed as quickly as possible. That would be consistent with this Court's stay order, which recognized the need for "appropriate dispatch." It would also be consistent with past practice. This Court routinely expedites review where a more protracted schedule threatens to inflict harm on the litigants and where the question is of vital importance to the Nation as a whole. *See e.g.*, Order, *Citizens United* v. *FEC*, No. 08-205 (U.S. June 29, 2009) (scheduling reargument during the summer recess); Order, *United States* v. *Booker*, No. 04-104 (U.S. Aug. 2, 2004) (advancing oral argument to the first day of the October Term).

Respondents therefore respectfully suggest that, if this Court grants certiorari, it should schedule oral argument for the Court's March sitting. That timetable may be accommodated through a slight reduction in the traditional briefing schedule, an adjustment that will not work any great hardship on the parties given the extent to which these issues have already been briefed.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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JANUARY 2018